ASIAH HJ. ABDUL MAJID

v.

MUHAMAD DALIN

HIGH COURT MALAYA, SEREMBAN
MUSTAPHA HUSSAIN J
[SUIT NO. 25-23-86]
2 FEBRUARY 1987

LAND LAW: *Right of way - Trespass - Injunction - Section 176(2)(a) of National Land Code - Article 13(1) of Federal Constitution - Whether defendant had a right of way through plaintiff's land.*

The plaintiff filed this suit on 15 January 1986 against the defendant for entering into the plaintiff's land and claiming a right of way thereon and prayed for an injunction restraining the defendant from so doing and for damages and costs. The plaintiff also applied by way of a Summons-in-Chambers on 16 January 1986 for an injunction but it was disallowed by the Court after full consideration on 20 March 1986 on the ground there was no irreparable damage to the plaintiff, that the defendant could adequately compensate the plaintiff in damages (as he owned a piece of land and house), the balance of convenience was on the side of the defendant and that it is highly oppressive to the defendant if the injunction was granted. The Court also ordered an early trial of the suit proper.

The defendant denied having wrongfully entered into plaintiff's land and averred that the land he was using was an access reserve.

Held:

[1] It was clear from the qualified title that the area of the land was about 2 acres and that the boundaries were provisional. It was also clear from the evidence of the Penolong Pemungut Tanah Seremban that the boundaries were provisional and when the qualified title was issued, the boundaries were demarcated by pegs.

[2] Even the plaintiff's father had applied for a survey to be done on his land and the result shows the existence of a road reserve. The plaintiffs' application for survey and the Land Office's letter also confirmed the existence of the road access.

[3] The defendant by force of circumstances and dire necessity, after seeking the permission of the plaintiff which was declined, and after obtaining confirmation from the authorities, had to resite the plaintiff's fencing to about 4 meters as he had no other choice in the face of the uncompromising attitude adopted by the plaintiff.

[4] For the reasons stated above, His Lordship held that there was an access road reserve and that the defendant did not trespass into the access road.

[Plaintiff's suit dismissed with costs]

Legislation referred to:
Federal Constitution, art. 13(1)
National Land Code 1965, s. 176(2)(a)

For the plaintiff - Nagarajah Muttiah; M/s. Shook Lin & Bok
For the defendant - Ibrahim bin K. Moideen; M/s. Ibrahim Moideen & Co.

JUDGMENT

Mustapha Hussain J:

The plaintiff is the registered owner of a piece of land known as HS. (M) 183 Lot 3611, Mukim Rantau, Negeri Sembilan (hereinafter referred to as "the said land").

The plaintiff filed this suit against the defendant for entering into plaintiff's land and claiming a right of way thereon. The plaintiff prayed for an injunction restraining the defendant from so doing and for damages and costs.

In his defence, the defendant denied having wrongfully entered into plaintiff's land, and averred that the land which he was using was an access reserve, a narrow strip on one side of the plaintiff's land, running from the main road to defendant's land inside.

Plaintiff had put up a fence around her land and though not staying there, she planted fruit trees. A time came when the defendant became owner of the land further inside which was known as Lot PT. 77 and he started constructing a brick house thereon and for the purpose of moving his building materials to the land, an access to his land became a necessity. The defendant approached the plaintiff, the Land Office and the ketua kampong. The Land Office informed the parties that there was indeed an access road reserve leading to defendant's land. A letter to this effect dated 23 October 1985 was addressed to the plaintiff from the Land Office saying in clear language that there was a road reserve measuring 4.085 meter wide between plaintiff's land and the adjacent Lots, Lot 181 and Lot PT. 77 (belonging to the defendant). On the strength of this letter from the Land Office, the defendant lodged a Police Report on 16 November 1985, No. 202/85 at Rumah Pasong, Kuala Sawah, to the effect that the defendant after receiving the confirmation that there was a road reserve, would be re-siting the plaintiff's fence. This re-siting of the fence took place some time in late November 1985. The plaintiff however refused to accept that there was such an access road reserve, maintaining that no such access reserve was shown on her title. She also made a Police Report about the re-siting of her fence.

The plaintiff filed this suit on 15 January 1986 followed by a Summons-in-Chambers on 16 January 1986, applying for an injunction and during the hearing of the Summons, the Court visited the site. The Court after full consideration, on 20 March 1986 disallowed the plaintiff's application for an injunction, on the ground that there was no irreparable damage to the plaintiff, that the defendant could adequately compensate the plaintiff in damages (as he owned a piece of land and a house), the balance of convenience was on the side of defendant and lastly it would be highly oppressive to the defendant if the injunction was granted. The Court also ordered an early trial of the Suit proper and fixed the hearing to 1 & 2 October 1986, to dispose of once and for all the dispute between the parties.

At the hearing the plaintiff a school teacher, aged 50 years, and living in Petaling Jaya, said that her father transferred the said land to her in 1982. Her father had told her that there was no road reserve along the land and it was her father who had put up the fence. She did not know of the road reserve until the letter from the Land Office dated 23 October 1985 (p. 8 of 'A') saying that there was a road reserve. She stated that in her title in respect of the said land and there was no indication of any road reserve. She had met the defendant who had asked her permission to use the road reserve but she refused to accede to defendant's request. She admitted going to the Land Office where she was informed of the access road reserve but she had instructed her solicitors to resist the contention of the Land Office of the existence of the access road reserve. The plaintiff had subpoenaed the Penolong Pemungut Tanah Daerah Seremban but then decided against calling him as her witness.

The defendant called the Penolong Pemungut Tanah Daerah Seremban Encik Khalid bin Md. Ariff (DW1) to give evidence on his behalf. This witness from the Land Office, Seremban though subpoenaed by the plaintiff, give a true picture of the workings of the Land Office regarding the issue of titles, surveys and processes involved in the alienation of lands by the Government. This witness (DW1) then traced the history of the said land. Originally the said land was part of a bigger piece of land measuring 2.744 acres. It was a quarry reserve vide GN. 7413/33. In 1954 by GN. Vol. 369 dated 15 July 1954, the quarry reserve notification was revoked and the land became State land.

On 24 December 1975, the NS. State Executive Council agreed to give about 2 acres of the above State land to Haji Abdul Majid bin Abdul Latiff (the plaintiff's father). This was done by issuing State Lot No. 3011 under a Hak Milik Suratan SSM. 183. The area of about two acres was demarcated by pegs and the acreage was only provisional. The witness referred to s. 176(2)(a) of the National Land Code and said that the area alienated and the pegs demarcating the boundaries were "provisional". When this title was given to plaintiff's father, the right of way (i.e the access road reserve)was not registered and shown on the title.

A portion of about ½ acre of the original 2.744 acre was later given to one Latifah bte Ibrahim who in turn transferred it to the defendant.

It also transpired that the plaintiff's father himself had made an application for survey of his land and this was admitted in evidence as P1. When it was shown (at reverse of P1) that there was an access road reserve ("simpanan jalan"), the witness confirmed it.

The defendant himself did not give evidence as the parties agreed that the issue in this Suit could be decided on the evidence of the Penolong Pemungut Tanah Daerah Seremban (DW1) and the documents in the Agreed Bundle "A" and the exhibits.

There was only one issue before the Court in this case and that was whether the defendant had a right of way through the plaintiff's land. It boiled down to whether there was an access road reserve on one side of the plaintiff's land running along from the main road to the rear to defendant's land.

It was quite clear from the Qualified Title itself (see pp. 9 to 12 of Agreed Bundle "A") that the area was about two acres ("luas sementara 2 ekar"). On the second page of the QT. (p. 10 of "A") it mentioned right at the top that the boundaries were provisional and not yet confirmed or finalised. This was in confirmation with s. 176(2)(a) of the National Land Code 1965.

It was also clear from the evidence of Penolong Pemungut Tanah Seremban, the witness from the Land Office who was subpoenaed by the plaintiff but used by the defendant as his sole witness, that the boundaries were provisional and when the QT was issued the boundaries were demarcated by pegs.

It is true that on the plaintiff's QT itself there was no mention of the access road reserve on one side of her boundary but then one cannot escape the fact that the boundaries are provisional and not yet finalised. Way back when the said land was still in the name of plaintiff's father, he himself had applied for a survey to be done. Form P1 on the reverse side shows the existence of such a road reserve. The plaintiff herself had engaged a surveyor and the survey carried out by him confirmed the existence of an access road reserve. (See p. 13 of "A" and see letter from Pentadbir Tanah Daerah, Pejabat Daerah dan Tanah, Seremban, dated 5 Feburary 1986 together with the "Permintaan Ukur" PU. 4/86 dated 28 January 1986 by the plaintiff which were exhibited by the defendant in his affidavit affirmed on 12 Feburary 1986 Encl. 6)

The boundaries of the land were not yet finalised and the area too was not yet finalised. Application made by the plaintiff's father for a survey of the said land (Exhibit P1) confirms that there is indeed an access road reserve. The plaintiff herself by her Permintaan Ukur PU. 4/86 dated 28 January 1986 (strangely not included by the plaintiff in her Bundle of Documents but exhibited by the defendant in his affidavit)confirmed the existence of the access road reserve. The Land Office by letter (p. 8 of "A") also confirmed the existence of this access road reserve. Why was the plaintiff herself then denying the existence of such an access road reserve?

The defendant by force of circumstances and dire necessity, after seeking the permission of plaintiff which was declined, and after obtaining confirmation from the authorities, had to re-site the plaintiff's fencing to about 4 meters as he had no other choice in the face of the uncompromising attitude adopted by the plaintiff. And if some fruit trees of the plaintiff had been destroyed in the process, it was the fault of the plaintiff herself. It could not be said that the defendant was then trespassing into the access road reserve.

It is only after the final survey when the actual area will be determined, the issue of final document of title demarcating the area, that the protection under Article 13(1) of the Federal Constitution comes into effect. Until then, the boundaries shown on Hak Milik Sementara shall be treated as "sementara" or provisional.

The plaintiff's suit was therefore dismissed with costs.

Also found at [1987] 1 CLJ 381